Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 92-90
	)	
The Telephone Consumer Protection Act of 1991	)	
	)	

REPLY COMMENTS OF THE CENTER FOR THE STUDY OF COMMERCIALISM

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June 25, 1992

SUMMARY

The Center for the Study of Commercialism [hereafter "CSC"] urges the Commission to adopt regulations restricting live telephone solicitations, and to narrow its proposed exceptions for auto-dialed telemarketing calls. In particular, CSC urges that the "prior or current business relationship" exception be substantially narrowed, and that autodialed calls to businesses also be restricted by the new rules.

As CSC and other commenters have pointed out, the proposed rules fail to fulfill the Congressional mandate contained in the Telephone Consumer Protection Act of 1991 that the Commission regulate "live" telemarketing solicitations as well as autodialed calls. Evidence submitted in this record supports the need for the Commission to take such action.

Furthermore, the comments filed in this proceeding demonstrate that regulating such calls via a national "do not call" database is both practical and cost-effective. The costs of establishing and maintaining such a list are minimal in light of the substantial profits that both telemarketers and telephone companies receive from telemarketing operations. Forcing the profit-makers to share these incidental costs is more appropriate than forcing unwilling consumers to bear them, as they now do, in the form of invasive, annoying solicitations. CSC disagrees with those comments which claim that such regulation cannot be done in a cost-effective manner.

Finally, CSC also agrees with other commenters that the proposed restrictions on auto-dialed calls do not go far enough in two respects. First, the proposed exemption for callees with whom a business had a "prior business relationship" is excessively broad, in that it permits calls to individuals who have severed any such business relationship and clearly do not wish to be called. In addition, it provides no mechanism for customers to terminate such relationships. Secondly, CSC believes that auto-dialed calls to businesses are equally as intrusive and costly as those made to residential subscribers, and must also be regulated in order to carry out the intent of Congress. Thus, CSC strongly suggests that the Commission modify its proposed rules in these two areas.

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The Center for the Study of Commercialism hereby submits the following reply comments in response to the Federal Communications Commission's above-captioned Notice of Proposed Rulemaking, FCC #92-176, released April 17, 1992 (hereafter "Notice").

I. THE TCPA REQUIRES THAT THE COMMISSION ACT TO REGULATE "LIVE" CALLS AS WELL AS AUTODIALED ONES.

As CSC emphasized in its earlier comments, Congress passed the Telephone Consumer Protection Act of 1991[1] with the clear intent that the Commission establish a method for restricting "live" telemarketing calls to unconsenting consumers, in addition to restricting autodialed and recorded messages. Contrary to the Commission's reading of the Act, the fact that both autodialed and live calls create problems does not mean that only one type of call should be regulated. In fact, both the language and the

[1] Telephone Consumer Protection Act of 1991, 102 P.L. 243; 105 Stat. 2394, enacted Dec. 20, 1991, codified at 47 U.S.C. § 227 (hereafter "TCPA").

legislative history of the Act indicate that its intent was to restrict both types of telemarketing.

First, as stated in the TCPA itself, Congress has concluded that unwanted telemarketing of any kind is an expensive, intrusive nuisance and invades the personal privacy of many American consumers. Findings (1)-(8), TCPA § 2. Had Congress chosen to do so, it could easily have made a finding that calls placed by human beings are less intrusive than automated calls. However, it chose not to make that distinction, and instead passed a bill to regulate both. The fact that the TCPA contains separate and detailed prohibitions and presumptions for automated and "live" calls clearly demonstrates an intent to regulate each type of call in the most appropriate manner. While it is true that the Act vests discretion in the Commission to determine how best to protect unconsenting consumers,[2] there can be no dispute that the Commission must finally permit consumers to "opt out" of receiving such calls in the most efficient and inexpensive way.

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[2] The specific language of the TCPA requires the Commission to consider the

> need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object,
> . . . whether there is a need for additional Commission authority to further restrict telephone solicitations,
> . . . and, if such a finding is made and supported by the record, propose specific regulations to the Congress;
> [and to] prescribe regulations to implement methods and procedures for protecting the privacy rights described [above] in an efficient, effective and economic manner
> . . .

47 U.S.C. § 227(c).

Furthermore, the legislative history of this section indicates that the Commission's role is merely to apply its technical expertise in the area to select the most appropriate regulatory method.[3] For example, Senator Pressler, a chief sponsor of the bill, explained that

> the primary purpose of this legislation is to develop . . . rules for . . . cost-effective protection of consumers from unwanted telephone solicitations . . . [the bill] directs the FCC to prescribe regulations to protect the privacy rights of consumers . . . [and] to prohibit cold calls by any telemarketer to the telephone of [an unconsenting] consumer.

137 Cong. Rec. S16201-02 (daily ed. Nov. 7, 1991) (statement of Sen. Pressler). Rep. Markey stated that the bill was intended to end "the nightly ritual of phone calls to homes from strangers and robots." (Emphasis added.)[4] Surely neither Congressman intended that the Commission take no action to protect consumers and merely declare these Congressional concerns unfounded.

In addition to these floor statements, both Congressional Committees which approved the bill also intended that it restrict

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[3] Other consumer-oriented commenters agree. See, e.g. Comments of Lejeune Associates of Florida at 5-6, 12-13, 17; National Consumers League at 2-3 & 8-10 (urging recall of the Notice as violating Congressional intent to regulate live calls because of their nuisance factor), Consumer Action at 9-10, the Ohio Public Utilities Commission at 5, Privacy Times at 1, and the ACLU at 4-5.

[4] 137 Cong. Rec. H11,310 (daily ed. Nov. 26, 1991) (statement of Rep. Markey). See also 137 Cong. Rec. H11,311 (daily ed. Nov. 26, 1991) (statement of Rep. Rinaldo); 137 Cong. Rec. S8,991 (daily ed. June 27, 1991) (statement of Sen. Pressler).

live solicitations.[5] Most conclusive is the Committee Report on H.R. 1304, the House bill which originally contained this rulemaking requirement, and which was incorporated word-for-word into this bill. According to the Committee on Energy and Commerce's favorable report on the bill, "the preponderance of the evidence demonstrates the existence of a national problem" with intrusive telemarketing. "[T]he legislation requires that the . . . [FCC] compare and evaluate alternative methods and procedures for protecting residential subscriber privacy rights and to prescribe regulations implementing the most effective method or procedure."[6] This legislative history clearly demonstrates that Congress considered both types of calls potentially intrusive, and fully intended to regulate both. The Commission's failure to respect this legislative record is unconscionable.

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[5] H. Rep. No. 317, 102d Cong., 1st Sess. (1991) (hereafter "House Report"). See also Telephone Consumer Privacy Issues: Hearings on S. 1410 and S. 1462 before the Subcommittee on Communications of the Senate Commerce Committee, 102d Cong., 1st Sess. (1991) (statements of Michael Jacobson and Robert Bulmash); Telemarketing/Privacy Issues: Hearing on H.R. 1304 and H.R. 1305 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102d Cong., 1st Sess. 1, 38, 56, (1991) (statements of Rep. Markey; Mark Cooper, for the Consumer Federation of America; Jack Shreve, Florida Public Counsel, for the National Association of State Utility Consumer Advocates; Janlori Goldman, for the ACLU) (hereafter "House hearing").

[6] House Report at 6, 10. The Committee emphasized that "[a]lthough the legislation gives the Commission latitude within its rulemaking to select among different methods and procedures . . ., the Committee expects the Commission to choose the alternative that is most effective in protecting telephone subscriber privacy." Id. at 19.

Finally, it must be recalled that the original version of S. 1462, which dealt only with automated calls, is not the bill which the Senate enacted into law. Instead, it amended the bill to combine it with the provisions of H.R. 1304, which was specifically designed to regulate live calls, and which ordered this rulemaking.[7] Had Congress not believed that live calls are a problem, it need not have amended the bill to order this proceeding. The Commission's "tentative conclusion" that no regulation is needed in this area violates the intent of the TCPA, renders its extensive balancing factors a nullity, and abrogates the Commission's duty to offer consumers the option of avoiding all telemarketing intrusions, regardless of form.

In support of its position, the Commission notes that it receives fewer complaints about live calls than about autodialed ones. However, many consumers make complaints to their state regulatory agencies, to their Congressional or state representative, to the caller's company, to the Direct Marketing Association, or to consumer groups, rather than to the Commission. As the Comments of Lejeune Associates note, Florida

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[7] Compare S. Rep. No. 178, 102d Cong., 1st Sess. (1991) with H.R. 1304 and S. 1410. The original Senate version of the bill, S.1462, the Automated Telephone Consumer Protection Act, covered only automated and facsimile calls. It was later combined with H.R. 1304, which regulated live calls and had been separately passed by the House. As finally enacted, the bill addressed "live unsolicited commercial telemarketing" as well as autodialing, and was intended "to prohibit cold calls by any telemarketer . . ."). See 137 Cong. Rec. H11,310-11 (daily ed. Nov. 26, 1991) (statements of Reps. Markey and Rinaldo); 137 Cong. Rec. S16,202 (daily ed. Nov. 7, 1991) (statement of Sen. Pressler).

regulators receive 300-500 complaints per month under their version of the TCPA.[8] Similarly, the Ohio Public Utilities Commission reports receiving 100 telephone solicitation complaints per month.[9] In fact, the complaints filed in this proceeding alone, by both individuals and consumer organizations, are sufficient evidence to support the Congressional finding that such calls should be regulated.

It cannot be denied that many consumers will seek to protect themselves from unwanted calls if given that option. To date, over 440,000 consumers have placed their names on the Direct Marketing Association's voluntary do-not-call list, and over 25,000 have paid to join Florida's recently established database.[10] Finally, as other commenters point out, it is likely that limiting auto-dialed calls without restricting live calling will merely "shift" the problem. As telemarketers increase their reliance on the latter strategy, live calling will

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[8] Comments of Lejeune Associates at 7-10 (compared to 50 complaints per month before their law was passed); House Report at 18; House Hearing, at 57 (1991) (statements of Jack Shreve, Florida Public Counsel and representative of State Consumer Utility Commissions).

[9] See Appendix A, Comments of Ohio Public Utilities Commission. See also House Report at 8-9, 18. The Committee cited a number of studies and complaints in its record, including a 1990 Roper poll which found that such calls annoy 67% of all respondents; it also explained that many complaints are directed to other than federal sources, and thus are difficult to quantify. Accord, Comments of the National Consumers League, Consumer Action, Privacy Times, Private Citizen, and Texas Public Utilities Commission.

[10] See Lejeune comments at 8-9; House Hearings at 57, 102-103, 126-131 (1991) (statements of Jack Shreve, Florida Public Counsel; Richard A. Barton, Direct Marketing Association).

generate even more complaints. See Comments of Consumer Action at 9-10.

The large volume of comments submitted by telemarketers claiming that their activities do not violate consumer privacy must be discounted, since they are the ones who profit from such invasions and will stand to lose money under any Commission regulation. The fact that many telemarketers would prefer to continue "business as usual" -- repeatedly harassing unwilling consumers by trying to sell them unwanted and unneeded products, without recourse by the consumer -- is not surprising, and should not affect the Commission's decision. Passage of the TCPA has already settled the issue. By ordering the Commission to consider methods of regulating live solicitation, Congress has already decided that unwanted live solicitations are a nuisance and should be restricted. All that is before the Commission is the technical question of determining how to best protect consumers. It may not abrogate this duty by declaring the problem solved.

In addition, no exemptions can be permitted for "first-time callers," "courteous" salespeople, or those who sell particular products or services, as suggested by some commenters.[11] No matter how courteous a salesperson might be, the invasion has already occurred by the time the unwilling target has dropped whatever they are doing to answer the telephone. Thus, each such

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[11] See Comments of the American Resort Development Association; Merrill, Lynch, et al.

"nuisance" call represents a separate and distinct invasion of privacy. In addition, such broad exemptions would render any regulatory scheme unenforceable and engender endless litigation over what was said to whom, and when, the intent of the parties to the conversation, and whether the consumer used "magic words" sufficient to trigger the statute's protection. Furthermore, the "self-policing" implicit in any company-based "do-not-call" list has already proven to be ineffective, as least by the many callers whose greed overtakes their sound business sense. The TCPA requires an effective means to protect the privacy of those who wish not to receive such calls, not a series of loopholes that swallow the rule.

In sum, the TCPA requires the Commission to limit all interstate telemarketing calls to unconsenting targets, whether live or auto-dialed, and to ensure that such limits are readily enforceable. Both the findings in the Act itself and the substantial number of complaints to Congress, the Commission, state agencies, and telemarketing companies and associations support the conclusion that Commission action is required. Disregarding this substantial record and permitting the telemarketing industry to "regulate" itself, as the Commission has proposed, would be arbitrary and capricious.

II. A NATIONAL "DO-NOT-CALL" DATABASE WOULD BE THE MOST EFFICIENT AND COST-EFFECTIVE METHOD FOR REGULATING LIVE CALLS

A nationwide database is far superior to company- or industry-based "do-not-call" lists as a method of protecting

consumer privacy, because it would be readily accessible, minimally burdensome to both consumers and telemarketers, cost-effective, and readily enforceable. Although CSC continues to believe that a national "do-call" database is the best option, as set forth in our earlier comments, a "do-not-call" database would accomplish most of the same objectives without creating additional First Amendment and privacy concerns. See Comments of American Civil Liberties Union at 4-7. It is also the only option preferred by all consumer-oriented commenters, and appears frequently in the legislative history of the Act.[12]

Operation of the list would be simple. As explained by several of these commenters, all telemarketers would be required either to regularly purge their "target lists" of any names appearing on the list, or to confirm whether a name appeared on the list before making each call. A national do-not-call list would not be difficult to administer because it could build on the successes of existing lists, without replicating their drawbacks.[13] For example, the lists now maintained by the state of Florida, the Direct Marketing Association ("DMA"), and Private Citizen, Inc., though far from comprehensive, enjoy widespread support from industry groups as well as consumer representatives and state regulatory agencies.

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[12] See House Report at 19; Comments of Lejeune at 18, Privacy Times at 2, Private Citizen, Consumer Action, and National Consumers League, et al.

[13] See testimony of Richard A. Barton, House Hearings, at 107.

It is clear that all parties, including the telemarketers themselves, benefit from "screening" their calls against such a list. First of all, consumer privacy is protected on request; secondly, sellers need not waste their time calling individuals who are not interested in their products and will refuse to purchase them. Perhaps even more importantly, regulatory agencies may easily determine whether a complaint is valid by checking to see whether a customer is listed and whether calls were placed after the requisite period of time. Accord, Comments of Lejeune at 14-15; Consumer Action at 11; Texas and Ohio Public Utilities Commissions.

CSC also agrees with these commenters that any system adopted by the Commission must be readily accessible to consumers. Available methods include establishing an 800 number, regularly inserting mail-in forms or call-in notices in local telephone bills and directories, or making such forms available elsewhere.[14] Such systems are already utilized for a variety of products and services, and operate at very low cost to the local telephone company.[15] For example, Independent

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[14] For example, the National Consumer League and Privacy Times suggest using change-of-address forms available in post offices as a convenient, inexpensive point of access. See Comments of National Consumer League at 16-17; Privacy Times at 2. If inserts prove too expensive, local phone companies could print a sentence or two on monthly telephone bills every quarter, as they do to notify consumers of other available services, and/or could announce it when connecting new residential service. In any case, notification should be simple and cheap.

[15] Of course, the Commission could provide that any such costs would be reimbursed by a tax or fee on service or equipment leased to telemarketers, or by a nominal charge, prorated by

Telecommunications Network (or "ITN") has proposed adding the "do-not-call" listing to existing SS7 network systems, which are used to automatically confirm calling card and third-number billing requests. See ITN Comments at 2-8. Because this technology is already in place, ITN projects very low start-up costs.[16] Even assuming 18-20 million calls per day, the total costs amount to less than .1% of total telemarketing sales annually, or $.10 per $100 worth of goods purchased. This cost is minimal in light of the system's efficiency and ability to automatically block all calls to unwilling consumers.[17]

In addition, any such list must also allow telemarketers to easily compare their lists of prospective clients with the list

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number of calls made per month, so as not to unduly burden small sales operations.

[16] ITN projects use costs of approximately $.06 per call or "query." Id. at 6. If one assumes that each unwanted call costs the recipient as little as $.10 in "nuisance" time spent answering the phone, rejecting the sales pitch, and disconnecting the caller, and multiplies this figure by 18 million calls per day or roughly 5 billion per year, unrestricted telephone sales conservatively cost the American consumer $500 million per year. against that backdrop, this system would not only shift the costs back where they belong, it offers a net savings to consumers of $.04 per call.

[17] However, CSC recommends that the Commission conduct an independent cost-benefit analysis of the available options, rather than relying on inevitably biased industry sources to do so. Otherwise, it is impossible to determine the technical feasibility of any given system, or to establish specifications to be included in Requests for Proposals to develop and operate the system. As discussed in these Comments, at least three private for-profit companies have indicated their willingness and technical expertise in operating such computer-based networks. See, e.g., Lejeune Associates (SRS call-blocking), Independent Telecommunications, Inc. (SS7 call-query network technology), or Winstead Sechrest & Minic ("predictive dialing" systems).

of consumers who do not wish to be called. In light of the House Committee's finding that 82% of all telemarketing operations are computerized, and that list-screening and updating companies already exist and are widely utilized,[18] any "do-not-call" list must be made available on floppy disk or computer tape, so as to be easily and automatically updated both by the provider and by the end user. As the House Report notes, many companies already exist which specialize in updating lists to catch potential customers who move, die, change phone numbers, or make other "lifestyle changes" which might affect their buying patterns. Id. at 7-8.

Several of the technical options proposed by other commenters appear simple, easily accessible, and minimally burdensome to consumers. For example, Lejeune Associates markets an automatic call-blocking system, which can be installed on outgoing telephone lines, regularly updated, and provides 100% efficiency at blocking all programmed numbers.[19] Thus, individual sales associates need not waste time checking directories or screening lists and are not tempted to violate the

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[18] House Report at 7. The Committee also explicitly endorsed the national database concept as "a regulatory tool that would fit easily within the machinery of the modern, computer-based telemarketing operation," and an attempt to address concerns expressed by the Direct Marketing Association and National Retail Federation. Id. at 20-21.

[19] See Comments of Lejeune at 17-25, estimating start-up costs at $2.5 million, plus internal costs to each telemarketer of installing the blocking network. It might be possible for the Commission to tentatively approve more than one system, such as the three presented in these comments, and permit telemarketing companies to select the most cost-efficient for their needs.

consumers' wishes by accidentally or deliberately calling names on the list. At least one commenter has indicated that assigning all telemarketers to a special prefix and permitting the local telephone company to block all calls, as they now do for (900) sex lines, is a technically feasible alternative.[20] Whatever method is selected for "downloading" numbers from the central database, the Commission must ensure that the system is minimally burdensome without sacrificing consumer convenience and enforceability.[21]

The database could be maintained and administered either by a trade association or a private company, as long as the Commission provides sufficient oversight and enforcement.[22] This could be done through a licensing fee or by direct assessments, either by the Commission or through another cost-

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[20] Winstead, Sechrest & Minic have suggested the universal-prefix blocking approach, as well as endorsing a telemarketer-based "predictive dialing" system. However, it is not clear whether this would sufficiently restrict live calls. See their Comments at 1-4.

[21] The House Report includes a number of different cost estimates from private companies, including the FCC itself (three estimates ranging from $500,000 to $6 million); the Congressional Budget Office ($3-5 million over five years); Sprint, AT&T, and the National Exchange Carriers Association. Id. at 12, 22-23. Because it has given so little guidance in this proceeding, the Commission must either put out a second proposal with workable criteria for a national database, conduct its own independent cost-benefit analysis, and/or request comparative bids based on uniform specifications. Otherwise, any "rigorous cost-benefit analysis" is a farce. See, e.g. cost assumptions and specifications in House Report at 21.

[22] CSC urges the Commission not to consider operating the database itself, but contracting it out to private entities, as intended by the House Committee. See House Report at 23.

sharing arrangement. All telemarketers/subscribers would share start-up and distribution costs, including the salaries of telephone operators, updating staff, and other overhead, prorated by size, number of operators/sales associates, or number of calls made per month. The telemarketers could elect a governing board to oversee the list's administration. All telemarketers would pay a nominal periodic fee to cover the costs of compiling and maintaining the list. CSC agrees with other commenters that the list should be updated monthly, with an additional appropriate (perhaps thirty-day) grace period before enforcement proceedings would be permitted. This would ensure both that consumers are protected in a timely manner and that telemarketers would have ample time to input the monthly additions to the list.

Finally, CSC agrees with the Commission's suggestion that the costs should be borne entirely by the telemarketing industry, and not by citizens, as the Act requires.[23] Because telemarketers are the entities that profit directly from these calls, it is only fair that they bear the financial burden of ensuring that their businesses do not offend unconsenting consumers.[24] In addition, it seems reasonable to require that they reimburse telephone companies for any services provided

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[23] TCPA § 227(c).

[24] Accord, House Report at 24; Comments of Consumer Action at 11; Lejeune at iii; U.S. West at 10, n. 25. As U.S. West correctly points out, forcing telemarketers to bear this expense would, in effect, spread the costs to willing consumers, because they will in turn pass it on to their customers. They are therefore the most appropriate parties to shoulder the burden.

through monthly bills, automatic call blocking, or otherwise.[25] Finally, as the Act mandates and the Notice clarifies, neither taxpayers nor consumers, as innocent parties, should be required to pay for the service. Those who profit from invading the privacy of the home should be held responsible for the costs associated with that privilege, not those whose privacy is being invaded.

CSC recognizes that many commenters have endorsed maintenance of the status quo, i.e. merely making the existing Direct Marketing Association and/or existing company-based "do-not-call" lists mandatory. However, Congress has already found such efforts to be ineffective and unsatisfactory.[26] If these methods worked, there would be no need for this legislation.

As for company- or industry-based lists, these are inherently so fragmented as to be nearly unenforceable, and are likely to engender protracted and expensive litigation over whether a consumer actually objected, when, and to whom. Furthermore, they cannot protect consumers from the very first call, since there is no affirmative way for the consumer to avoid the call or reject it in advance. Such a system thus permits

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[25] See Comments of Centel Corp. at 8-9, U.S. West at 8-10, & n. 21-25.

[26] See House Report at 19-20 (finding the existing DMA list to be unsatisfactory, because it is "not comprehensive in nature," contains fewer than 500,000 names, and is used by only 82 of the Association's 3,800 members. According to the Committee, a "more effective and comprehensive" means of protection was required by the bill). See also Comments of U.S. West at 3, 8, nn. 8, 20; Lejeune Associates at 29-31.

every different company at least one intrusive, unwanted call. Given the number of different telemarketing companies and their hotly competitive nature, a single consumer could be barraged with hundreds of unwanted calls before her company-specific requests would have any effect. Even then, it might be almost impossible for her to keep track of which companies she has previously notified, leading to repeated, though legal, invasions of privacy and mounting consumer frustration.

Paper lists or specially marked directories are absolutely unacceptable. As almost every commenter has argued, this method would be very expensive to produce, to amend, and to use effectively, given that most telemarketing lists are now computerized. Given the large number of names likely to appear on a national list, cross-referencing would be extremely cumbersome, errors frequent, and updating both difficult and expensive.

For the reasons given above, a computerized national database is the only option which will effectively protect consumers, provide a measure of due process and certainty for the industry, and be reasonably enforceable. While it may also be the most expensive system, the benefits will far outweigh the relatively minimal costs to be borne by industry.

III. THE PROPOSED EXCEPTION FOR AUTODIALED "PRIOR BUSINESS RELATIONSHIP" CALLS IS OVERBROAD.

Like other commenters, CSC takes issue with the Commission's expansive interpretation of the TCPA in creating this exception.[27] We propose that if such an exception is to be created at all,[28] it be strictly limited to "current" business relationships, defined as a set of transactions already occurring between the parties on a regular basis. Examples might be a book club or magazine subscription which has not yet expired, or a charge account for which an annual fee was paid during the last twelve months. The regulations must state clearly that no such relationship exists without an affirmative act by the consumer, such as an actual purchase or request for information. Under no circumstances may "cold-calling" be used as a method of creating such relationships, as some commenters have urged: such a rule would gut the TCPA and is wholly impermissible.[29]

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[27] See also Comments of Texas Public Utilities Commission at 3-4; Ohio Public Utilities Commission at 3; Consumer Action at 6-7; Privacy Times at 4; U.S. West at 3.

[28] As CSC argued in its earlier comments, the TCPA specifically authorizes this exception only for live calls. See TCPA § (a)(3)(A) and CSC Comments at 3-4 & n. 3.

[29] See Comments of Ohio Public Utilities Commission at 3 (prior solicitation alone is not enough); U.S. West at 3-4 ("inquiry" calls alone not enough; an actual exchange of consideration should be required). Compare Comments of American Resort Development Ass'n at 4 (acceptance of telephone solicitation during call enough to create "relationship.") Allowing loopholes for the very solicitations that the Act seeks to prohibit would be nonsensical, and exceed the Commission's authority under the Act.

As for the length of such relationships, CSC once again urges the Commission to create a rebuttable presumption that any such relationship will automatically terminate after no more than one year, unless a different term is provided by contract (such as a three-year membership or five-year loan). CSC agrees with Consumer Action, the Texas Public Utilities Commission, U.S. West, and other commenters that twelve months is a reasonable maximum for such relationships.[30] Of course, consumers may extend the relationship at any time before expiration by making further purchases or otherwise expressing their intention to continue the relationship.

Even more importantly, the regulations must clearly provide a means by which consumers may terminate any such relationship, and consumers must be informed of their right to do so on a regular basis.[31] The appropriate method of termination will

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[30] The House Report envisioned such relationships as lasting only "a reasonable period of time." Report at 14-15. It also intended such relationships to be limited to "substantially related" products or services, to ensure a "recently established interest in the specific" item. Id.

Compare Comments of Association of National Advertisers at 6 (urging Commission to permanently exempt [presumably uninterested] "highly targeted prospects" from protection); American Resort Development Association at 3-4 (urging variable lengths of "lifetime" relationships for timeshare purchasers, five years for two-week vacation renters, and 90 days for expired subscriptions). Such widely varying rules would be entirely unenforceable and render any such relationships non-severable, in violation of Congressional intent.

[31] Other commenters agree. See Comments of Texas Public Utilities Commission at 3; Consumer Action at 6 ("relationships" are current by nature); Ohio Public Utilities Commission at 7 (relationships must be narrowly defined in order to carry out the purpose of the Act).

depend on the database system selected. For example, during the offensive call itself, an unconsenting consumer might inform the sales representative that they no longer wish to receive such solicitations, and the salesperson would be bound to respect such a request and make a note of it on the in-house list. Alternatively or as a follow-up, customers might call or write to the company itself, to a central telemarketing office, to their phone company or to the Commission, who would refer the request to the appropriate enforcement entity.

To avoid conflicts between a customer's request to be placed on the national "do-not-call' database and her or his simultaneous decision to purchase items from a telemarketing company or catalog, telemarketers should be encouraged to seek express written permission to continue calling in appropriate cases. Any enforcement difficulties or conflicts could be resolved as they arise, either by eliminating this loophole or by other appropriate means. The key is that unwilling consumers must be regularly informed of their rights not to receive any such calls and to terminate any such relationships in order to knowingly waive their rights to do so.[32]

IV. AUTODIALED CALLS TO BUSINESSES SHOULD ALSO BE BANNED

Lastly, the Commission's tentative conclusion that <u>business</u> phones need no protection from autodialed calls is incorrect.

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[32] It is immaterial whether the information is provided by telemarketers, by local telephone companies, by the Commission, by public service announcements, or by all of the above, as long as it is done frequently.

Notice at 7-8. As several other commenters have noted, the Commission should regulate these calls as well, based on both the privacy and commercial interests at stake. Testimony in the legislative record and comments submitted in this proceeding supports this conclusion.[33] Calls to businesses interrupt meetings, interfere with productivity, force secretaries and receptionists to waste valuable time screening the calls, and generally interfere with the conduct of legitimate business. Thus, such calls should be regulated the same as those made to residences, and businesses should enjoy the same right to avoid auto-dialed nuisance calls. Treating all destination-numbers the same and eliminating this loophole will also facilitate enforcement and reduce telemarketers' potential for error in programming their autodialing machines.

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[33] See, e.g., Telephone Consumer Privacy Issues: Hearings on S.1410 and S.1426 before the Subcommittee on Communications of the Senate Commerce Committee, 102d Cong., 1st Sess. (1991) (statement of Michael Jacobson); Comments of Ohio Public Utilities Commission at 5, Texas Public Utilities Commission at 6, and Consumer Action at 9.

CONCLUSION

For the foregoing reasons, the Commission should modify its proposed rules to regulate live calls via a national database, to narrow the "prior business relationship" exception for autodialed calls, and to limit autodialed calls to businesses.

Respectfully submitted,

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June 25, 1992